LATHAM&WATKINS

IN PRACTICE THE LONDON DISPUTES NEWSLETTER

December 2013 LW.com

Disclosure v. Blocking Statutes

By Oliver Browne

The recent decision in *Secretary of State for Health and others v Servier Laboratories Ltd and others; National Grid Electricity Transmission plc v ABB Ltd and others* [2013] EWCA Civ 1234, concerned an appeal by two companies (in unrelated cases but concerning the same issues) that sought relief from a dilemma in which they claimed a court order placed them. The dilemma was as follows: if the companies provided information pursuant to an English court order they risked prosecution in France but, if the companies did not comply with the court order, they risked being held in contempt of court in England.

Facts

This decision is slightly peculiar because it concerns two appeals, but because of the court's listing commitments there was no joint hearing. However, both appeals raised similar questions. This article describes the facts of the first appeal in *Secretary of State for Health and others v Servier Laboratories Ltd (Servier) and others* (the Servier appeal) only by way of illustration.

A number of Servier companies incorporated in France were parties to an action brought in England by the NHS against Servier for a number of competition law infringements. Servier are suppliers of a drug used to treat hypertension and heart failure. The NHS accused Servier of a number of offences, including breaching Article 102 of the Treaty on the Functioning of the European Union (TFEU) by abusing its dominant position in the market, and breaching Article 101 of the TFEU by restricting competition over the supply of Perindopril.

In the early stages of the first instance proceedings, the court made an interlocutory order pursuant to CPR Part 18 (under which the court may order a party to clarify an issue or give additional information) requiring Servier to respond to the NHS's request for further information. Servier objected to the order on the grounds that compliance with the order would put Servier in breach of the French Statute No 68-678 of 26 July 1968, as amended in 1980 (the French blocking statute) and expose Servier to criminal prosecution in France.

The French blocking statute is very broad and states that:

> *Subject to international treaties or agreements and applicable laws and regulations, any individual is prohibited from requesting, seeking or disclosing, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical*

nature, with a view to establishing evidence in foreign judicial or administrative proceedings or in relation thereto.

Council Regulation (EC) No 1206/2001 of 28 May 2001

This European regulation (Regulation 1206), is concerned with cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. Regulation 1206 provides for a long and cumbersome procedure for taking evidence in another Member State including a "court to court" procedure in which a request is made to a court in another Member State to take such evidence. Servier contended that all requests for evidence should follow the process laid down by Regulation 1206.

The substantive issue before the English courts was whether in the circumstances it was mandatory for the judge to make use of Regulation 1206 in order to obtain the requested information and achieve the desired disclosure, or whether an English court order requiring disclosure was appropriate. The decision was made that much more difficult because of the risk of prosecution under the French blocking statute if Servier did comply with the order.

Decision

Considering this issue, and a number of other issues, the court dismissed Servier's appeal against the order (and the appeals of the companies in the other appeal) for the following reasons:

1. the point of Regulation 1206 was to streamline the process of obtaining evidence in another Member State and to increase the number of options available to parties for this process. The regulation was not intended to be the sole way of obtaining such evidence;

2. for this reason, and as supported by cases such as *Lippens v Kortekas* [2012] and *ProRail BV v Xpedys NV* [2013], a national court is entitled to use its national procedural law to summon as a witness, a party residing in another Member State in order to take evidence from that witness; and

3. whether or not compliance with the orders of the English court in cases such as this are illegal under French law, the English courts still have jurisdiction to make them as part of the ordinary process of disclosure in civil proceedings because such matters are governed by English law as the *lex fori* (the laws of England and Wales, *i.e.,* the jurisdiction where the action was brought).

The English court held that the process prescribed by Regulation 1206 was only mandatory when what is ordered in another Member State affects the powers of that other Member State. For example, in the *ProRail* case a "court to court" request under Regulation 1206 was required because the request involved the assistance of another Member State's courts and authorities in granting access to an expert. In *Servier* however, the English court was within its power to issue a court order despite the fact that compliance with the English order would lead to a violation of French law.

Another reason why the English court was willing to make the order, in spite of the arguments raised, was because there was only one known case of a prosecution under the French blocking statute in the last 30 years. The relevant case was that of *Christopher X* in 2007, which involved substantially different issues. Given that France is a signatory to the Treaty on the European Union and the TFEU, French law must generally give way to the principle of the supremacy of EU law, so the use of the French blocking statute to trump the requirements of EU law (especially fundamental provisions of EU competition law) would likely always be an unacceptable argument to advance before the English courts.